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5 UNITED STATES DISTRICT COURT  
6 DISTRICT OF NEVADA

7 MICHAEL MCINERNEY,  
8 Plaintiff,

9 vs.

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11 EIGHTH JUDICIAL DISTRICT COURT, *et al.*,  
12 Defendants.

Case No. 2:16-cv-00698-MMD-GWF

**REPORT AND  
RECOMMENDATION**

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14 This matter is before the Court on the screening of Plaintiff's Amended Complaint (ECF  
15 No. 7), filed on March 27, 2017.

16 **BACKGROUND**

17 On March 15, 2017, the Court entered an order granting Plaintiff's Application for Leave to  
18 Proceed *in forma pauperis* and a report and recommendation that Plaintiff's § 1983 claim against  
19 Defendant Eighth Judicial District Court be dismissed for failure to state a claim upon which relief  
20 may be granted. See ECF No. 4. The Court, however, found that the Plaintiff sufficiently pled a  
21 Fair Credit Reporting Act ("FCRA") claim against Defendant Hire Right, LLC ("Hire Right"). *Id.*  
22 The Court instructed the Clerk of the Court to issue summons to Defendant Hire Right and to  
23 deliver the summons to the U.S. Marshal for service. *Id.* In addition, the Court dismissed  
24 Plaintiff's FCRA claim against Defendant Swift Transportation, LLC ("Swift") without prejudice  
25 and granted Plaintiff leave to file an amended complaint. *Id.* On May 3, 2017, the Court entered  
26 an order adopting the undersigned's order and report and recommendation. See ECF No. 14.

27 **DISCUSSION**

28 On March 27, 2017, Plaintiff filed his amended complaint. ECF No. 7. Upon granting a

1 request to proceed *in forma pauperis* and granting leave to amend, a court must additionally screen  
2 a complaint pursuant to 28 U.S.C. §1915(e). Specifically, federal courts are given the authority to  
3 dismiss a case if the action is legally “frivolous or malicious,” fails to state a claim upon which  
4 relief may be granted, or seeks monetary relief from a defendant/third party plaintiff who is  
5 immune from such relief. 28 U.S.C. § 1915(e)(2). A complaint, or portion thereof, should be  
6 dismissed for failure to state a claim upon which relief may be granted “if it appears beyond a  
7 doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to  
8 relief.” *Buckey v. Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992). A complaint may be dismissed  
9 as frivolous if it is premised on a nonexistent legal interest or delusional factual scenario. *Neitzke*  
10 *v. Williams*, 490 U.S. 319, 327–28 (1989). Moreover, “a finding of factual frivolousness is  
11 appropriate when the facts alleged rise to the level of the irrational or the wholly incredible,  
12 whether or not there are judicially noticeable facts available to contradict them.” *Denton v.*  
13 *Hernandez*, 504 U.S. 25, 33 (1992).

14 In its order and report and recommendation, the Court instructed Plaintiff that if he elects to  
15 file an amended complaint, it must be complete in itself without reference to any prior pleading  
16 pursuant to Local Rule 15-1 and that the Court cannot refer to a prior pleading. ECF No. 4. In his  
17 amended complaint, Plaintiff alleges claims against Defendant Swift only pursuant to 42 U.S.C. §  
18 1983. He alleges that Defendant Swift denied Plaintiff employment based on its reliance on an  
19 inaccurate background check and, therefore, violated his constitutional rights found in the Due  
20 Process Clause of the 5th Amendment and the Equal Protection Clause of the 14th Amendment.  
21 See ECF No. 7.

22 42 U.S.C. § 1983 creates a path for the private enforcement of substantive rights created by  
23 the Constitution and Federal statutes. *Graham v. Connor*, 490 U.S. 386, 393-94 (1989). In order to  
24 state a claim under § 1983, a plaintiff “must allege the violation of a right secured by the  
25 Constitution and the laws of the United States, and must show that the alleged deprivation was  
26 committed by a person acting under color of law.” *West v. Atkins*, 487 U.S. 42, 48-49 (1988); see  
27 also *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982). A person acts under “color of law” if he  
28 “exercise[s] power possessed by virtue of state law and made possible only because the wrongdoer

1 is clothed with the authority of state law.” *West*, 487 U.S. at 49.

2 § 1983 does not reach private conduct, regardless of how discriminatory or wrongful it may  
3 be. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). Even involving cases where there  
4 is extensive state funding and regulation of a private activity, “the mere fact that a business is  
5 subject to state regulation does not by itself convert its action into that of the State for purposes of  
6 the Fourteenth Amendment.” *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); *see*  
7 *also Rendell-Baker*, 457 U.S. 830 at 842-43; *Morse v. North Coast Opportunities*, 118 F.3d 1338,  
8 1340-41 (9th Cir. 1997). Only where “there is a sufficiently close nexus between the State and the  
9 challenged action of the regulated entity” will the Court allow a defendant to be subjected to a  
10 §1983 claim. *Id.* A “close nexus” exists only where the State has “exercised coercive power or has  
11 provided such significant encouragement.” *Id.*, *see also Flag Bros. Inc. v. Brooks*, 436 U.S. 149,  
12 156 (1978). The Ninth Circuit has established a two part test to establish whether or not an alleged  
13 infringement of federal rights is fairly attributable to the government: “1) the deprivation must  
14 result from a government policy, and 2) the party charged with the deprivation must be a person  
15 who may fairly be said to be a government actor.” *Sutton v. Providence St. Joseph Med. Center*,  
16 192 F.3d 826, 835 (9th Cir. 1999).

17 Plaintiff alleges that Defendant violated his 5th and 14th Amendment rights by failing to  
18 conduct a proper pre-employment screening and brings his complaint under the auspices of § 1983.  
19 Plaintiff fails to establish the basic elements needed to successfully posit a claim under § 1983.  
20 First, Plaintiff fails to state that Defendant’s actions were the result of a government policy.  
21 Second, Defendant Swift appears to operate as a private transportation company, and not as a  
22 government actor. Furthermore, there is no connection between the State of Nevada and  
23 Defendant, other than the fact that Defendant is required to operate in accordance with state laws  
24 and regulations. Plaintiff has not pled sufficient facts to state a claim under § 1983.

25 The Court finds that Plaintiff cannot state a claim against Defendant Swift and recommends  
26 dismissal of his amended complaint (ECF No. 7). The Court previously found that Plaintiff made a  
27 prima facie showing of inaccurate reporting and allowed his FCRA claims against Hire Right to  
28 proceed. *See* ECF No. 4. Therefore, Plaintiff’s FCRA claim against Defendant Hire Right as

1 enumerated in his complaint (ECF No. 5) may proceed and may continue to be litigated by the  
2 parties. Accordingly,

3 **RECOMMENDATION**

4 **IT IS HEREBY RECOMMENDED** that Plaintiff's amended complaint (ECF No. 7) be  
5 dismissed due to Plaintiff's failure to state a claim against Defendant Swift.

6 **NOTICE**

7 Under Local Rule IB 3-2, any objection to this Finding and Recommendation must be in  
8 writing and filed with the Clerk of the Court within fourteen (14) days. Appeals may be waived  
9 due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142  
10 (1985). Failure to file objections within the specified time or failure to properly address and brief  
11 the objectionable issues waives the right to appeal the District Court's order and/or appeal factual  
12 issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991);  
13 *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

14 DATED this 20th day of December, 2017.

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17 GEORGE FOLEY, JR.  
18 United States Magistrate Judge  
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